rate as "unrepresentative" while identifying the lowest as "particularly notable."[42]

The Coalition next selects rates for ten communities in which overbuilds exist. Again, selected results from this tiny sampling are discarded on the grounds that the rates are too high. Many of the remaining systems in the sample appear to be very small, suggesting that they are unlikely to be representative of the cable industry. Finally, the Coalition does not even use the average of the rates for the overbuilt systems in its sample, preferring to give more weight to those low rates it likes and ignoring those high rates it does not.[43]

The Coalition next looks at rates for nine municipal systems. These systems are even smaller than the overbuilt systems, and thus even less representative. And again, results that are "too high" are edited out: some of the observations are excluded on the grounds that some municipal systems "match rates charged by private systems, and...return the excess profits to the community."[44]

The Coalition has thus based its proposed interim rates for more than 11,000 cable systems on observations from 32 admittedly unrepresentative communities, where the "data must be approached carefully," and where the "limited data...may be more useful as a

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[42] Appendix 2 at 3.

[43] Id. at 3-4.

[44] Id. at 4.

check on the foregoing than anything else."[45] Time Warner submits these contrived and unscientific data are not even worth that much.

B. Jurisdictional Division

1. The Commission's Authority to Regulate Basic Rates is Limited

As stated in its initial Comments, Time Warner fully supports the Commission's proposed reading of the jurisdictional division laid out in Sections 623(a)(3-6) to allow local authorities either to regulate basic cable rates or to elect not to regulate in which case the particular cable system would remain unregulated.[46] Under this construction, the decision whether to regulate vel non basic cable rates is fundamentally a local one, and the Commission has the power to "exercise the franchising authority's regulatory jurisdiction" when a franchise authority certification has been disapproved or revoked by the Commission, and then only until a new certification is approved.[47] Thus, as the Commission correctly observes, the Commission's power to regulate basic rates is, indeed, "quite limited."[48]

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[45] Id. at 3-4.

[46] Notice at ¶ 15.

[47] See Time Warner at 25-29. See also Continental at 13-15; Cox at 54-55; NCTA at 64-65; New York State Commission on Cable Television at 6.

[48] Notice at ¶ 15. See also id. at ¶ 87.

In this regard, Time Warner is particularly concerned by the suggestions of certain commenters that franchise authorities without the wherewithal to assert jurisdiction and regulate basic service rates "could institute Commission regulation merely by filing for certification and having that certification disapproved."[49] Such groundless certifications plainly contravene the 1992 Cable Act by attempting surreptitiously to delegate to the Commission greater authority to regulate basic cable rates than it is accorded by the Communications Act itself under Section 623(a)(6).[50] Because the statute permits the Commission only to "exercise the franchising authority's regulatory jurisdiction," the articulated scheme cannot succeed as a matter of law. To avoid any controversy or confusion on this issue, the Commission should expressly require that all certifications be filed in good faith and that all filing parties possess the requisite legal authority to regulate basic rates. If the Commission determines that either of these two requirements is not met, the Commission should reject the certification; if the franchise authority fails to cure its

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[49] COMOL at 11-12. See also MFA at 5.

[50] In addition, from a policy standpoint, such baseless certifications would have the further deleterious effect of relegating to the whims of local franchising authorities the ultimate determination as to whether the Commission should be obliged to shoulder the expense of basic cable regulation. Franchise authorities should not be able to trigger such a federal scheme under which federal taxpayer dollars will be spent to regulate in situations where local consumers desired not to spend local tax dollars.

certification promptly, basic cable rates in that franchise area must remain unregulated.[51]

2. The 1992 Cable Act is Not an Independent Source of Authority for Franchising Authorities' Ability to Regulate Rates

Time Warner also pointed out that the 1992 Cable Act does not and can not serve as an independent source of authority empowering local governments to regulate basic cable rates.[52] The 1992 Cable Act simply does not grant authority to local governments beyond that which they already possess under state law and local franchise agreements. The federal government cannot bestow upon the cities what the states have chosen to withhold from them, or what they themselves have bargained away in return for concessions made by the other party to the agreement.[53] Rather, the power of local franchising authorities to regulate basic cable rates must emanate from state law and the

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[51] See New York State Commission on Cable Television at 8 ("...NYSCCT agrees with the Commission that its jurisdiction pursuant to Section 623 to regulate basic rates directly is limited only to circumstances where a franchising authority is both authorized by state law to regulate rates and exercises such jurisdiction by seeking, but not perfecting or sustaining, certification").

[52] Time Warner at 26-27 (citing Communications Act §§ 623(a)(1), (a)(2)(A)). Several commenters who otherwise reject this reading of the statute nevertheless acknowledge that the specific language of the 1992 Cable Act authorizes Commission regulation of basic rates only in instances of disapproval or revocation of a certification. See City of Austin, TX et al. at 30; CFA at 123; MFA at 5.

[53] Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879) (counties, cities, and towns are municipal corporations created by the authority of the legislature and, except where the constitution of the state otherwise provides, they derive all their powers from the source of their creation).

franchise agreement. Absent such a source of power, a local franchising authority cannot regulate cable rates.[54]

Not only is this jurisdictional division required by the statutory language, it is also fully consistent with sound public policy. Because the local franchise authorities have incentives to "overregulate" cable services in ways which disserve consumers,[55] a local decision not to regulate should be given particular weight. Such decisions may reflect general satisfaction with the local cable operator, or a pragmatic decision that the costs of regulation outweigh perceived benefits, or a general ordering of local priorities as to how best to spend taxpayer funds. If the franchising authority decides not to regulate basic cable rates, the Commission should not be in a position to impose such regulation.[56]

A few commenters dispute the jurisdictional division called for by the plain meaning of the Act, insisting that the

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[54] See Time Warner at 26-27 (citing Amendment of Rules Regarding Regulation of Cable Television System Regular Subscriber Rates, 57 F.C.C.2d 368, 369 (1976) ("Our rules do not, and can not give authority to franchising bodies when that authority does not exist under state law. Rather, our rules and guidelines only apply when and if the authority is exercised pursuant to existing powers.") (emphasis added).

[55] The phenomenon is described in the economic literature as "prisoner's dilemma." Local regulators feel free to impose undue costs on local cable systems because the burden of these costs are spread nationwide.

[56] While the 1992 Cable Act establishes a framework in which local regulation, if undertaken, would be subject to federal rules and enforcement, it does not provide for the Commission to reverse local decisions not to regulate in the first instance. See New York State Commission on Cable Television at 8.

Commission assume an expanded role in the regulation of basic cable service and arguing that a franchising authority's power to regulate cable rates emanates from a number of additional sources, including the 1992 Cable Act.[57] Time Warner responds to each of these commenters, in turn, below.

a. Response to CFA

CFA argues that Section 623(a)(2)(A) is designed to deal only with the situations where a city's certification is inadequate, not where a local authority fails to step forward to regulate, and that Congress intended to regulate all basic cable service, either by the Commission or through local franchising authorities.[58]

In support of its assertion, CFA insists that there was a "major compromise" with the language of section 623 in the Conference Report.[59] While the section of the Conference Report cited by CFA does indeed contain a "compromise" in that it afforded the Commission greater flexibility in prescribing regulations to ensure that basic rates are reasonable,[60] the "compromise" which CFA searches to find does not exist with respect to Section 623(b)(6) ("Exercise Of Jurisdiction By Commission"). In fact, the cited language does not even address

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[57] See, e.g., CFA at 122-130; COMOL at 4-13; NATOA at 28-31.

[58] CFA at 123-132.

[59] Id. at 124.

[60] Conference Report at 62.

the question of jurisdiction. If the conference committee intended to expand the Commission's jurisdiction to regulate basic cable rates, surely it would have done so by amending Section 623(b)(6).

CFA next cites to the Senate bill and legislative history to support its argument that the Commission has broad authority to regulate basic tier rates.[61] However, because the "clear" Senate approach was not adopted by the conference committee, any Senate legislative history is nonauthoritative and, simply, irrelevant.

So, too, is the legislative history to the House bill. CFA quotes statements of Reps. Markey and Dingell made at the time of passage of the House version of the legislation regarding an amendment proposed by Rep. Oxley. CFA argues that these statements "contradict the Commission's tentative conclusion regarding its limited powers of regulation."[62] What CFA ignores, however, is that at the time these statements were made, the statutory language that CFA cites to support its assertion of expanded Commission jurisdiction -- Section 623(b)(1) providing that the Commission must ensure reasonable rates for all cable systems not subject to effective competition -- was not even in

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[61] CFA at 125, 127 and n. 118. S.12, of course, provided for quite a different allocation of regulatory jurisdiction for the basic service tier.

[62] CFA at 126.

the House bill.[63] Moreover, while Reps. Markey and Dingell plainly objected to the Oxley amendment, that amendment provided for state commission jurisdiction to the exclusion of both federal and local rate regulatory authority, a patently different structure than the one correctly found by the Commission in the new Act.

In short, CFA spends a good deal of time citing inapt language and ignoring the plain language of 623(b)(6) which clearly constrains the Commission's ability to regulate basic cable service to very specific situations, and then only on an interim basis.

b. Response to NATOA

NATOA claims that a franchising authority's power to regulate cable rates derives from the 1992 Cable Act in addition to local law and franchise agreements.[64] NATOA goes to great lengths to demonstrate that the power to regulate basic cable rates can stem from (1) home rule charters, (2) state statutes granting franchise authorities the right to control their streets and rights-of-way, and (3) police powers.[65] The problem with NATOA's analysis is that it begs the fundamental question. Time Warner has never disputed the fact that franchising authorities may have the ability to regulate basic cable rates pursuant to

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[63] As noted by CFA itself, this provision was adopted by the Conference Report at 62.

[64] NATOA at 28-31.

[65] Id. at 29-30.

state law and local franchise agreements.[66] However, if such authority does not emanate from state law and the local franchise agreement, it cannot be found in the federal statute. All the new Cable Act does is to remove certain of the 1984 Act's impediments to local regulation; it does not and cannot provide an independent source of authority, magically infusing franchising authorities with powers of which they were initially bereft.

More fundamentally, however, Time Warner disputes NATOA's claim that local franchising authorities have the power to regulate rates independent of an explicit state law or franchise provision providing for such regulation.[67] Indeed, notwithstanding NATOA's citation to inapposite cases, the great weight of authority supports the converse proposition, namely that an explicit grant of power is required:

> [Local] rate regulatory power cannot be derived ex nihilo, however, because it is an established principle that a municipality has no authority to impose rates unless the power to do so is expressly granted (by charter, statute, or constitution), or is necessarily implied by an express power, and such power is not implied by the general powers to grant franchises or to control uses of the streets.

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[66] Time Warner does not address here whether NATOA's analysis is correct, since whether state and local laws grant authority to a city is a case-by-case decision.

At the very least, NATOA's confusion regarding the sources of franchising authorities' power to regulate cable rates reinforces the need to accord cable operators the right to challenge certifications de novo.

[67] NATOA at 29.

> This principle is not restricted to rate regulation, moreover. Any police power regulation by local government must be expressly conferred or necessarily implied by an express power. Accordingly, state statutes or local charters should be examined to determine the extent of any such powers under the relevant municipal law.[68]

Further, as Time Warner demonstrated in its initial Comments, neither the statutory language nor the legislative history evince Congressional intent to empower franchising authorities with rate regulatory authority. In particular, Time Warner noted that were the Commission to find that the local franchising authorities' ability to prescribe such regulations could derive from the 1992 Cable Act, Section 623(a)(3)(B) of the Communications Act would be rendered meaningless and Section 623(a)(4)(B) would be rendered superfluous, since legal authority would not be subject to question if the 1992 Cable Act itself were its source.

c. Response to COMOL

COMOL disputes the Notice's tentative conclusion that the Commission's powers to regulate basic service is limited. COMOL cites language contained in the House Report to support its contention that Congress intended for the Commission to regulate rates for the basic service tier not only when the franchising

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[68] Ferris, Lloyd, & Casey, Cable Television Law, § 13-75, ¶ 13.14[3] (1992) (emphasis added) (footnotes omitted). See also Barnett v. Denison, 145 U.S. 135 (1892) (municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied because essential to carry into effect such as are expressly granted).

authority's certification was disapproved or revoked, but also when the franchising authority declined to regulate.[69]

The problem with COMOL's argument is that it relies on language not of the House Committee itself, but of a Congressional Budget Office Estimate reprinted in the Committee's Report. In presenting its estimates of the costs to be incurred to implement the 1992 Cable Act, the reprinted report contains gratuitous synopses of various sections of the 1992 Cable Act. Fundamental precepts of statutory construction provide that matter from an outside source reprinted in a committee report without indication of committee approval is not relevant or helpful history.[70] In MacDonald v. R. Best 186 F. Supp. 217 (1960), for example, a letter submitted by the Interior Department to the Senate Committee which reported on the Mining Claims Rights Restoration Act of 1955, and which was printed by the Committee in its report without apparent approval or any comment, fell short of an official pronouncement of the Committee itself, and accordingly was accorded little weight.[71]

Similarly, in the instant case, the quoted language, contained in a Congressional Budget Office Estimate which was merely reprinted without comment in the House Report, is simply not relevant or helpful legislative history. Clearly, it does

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[69] COMOL at 10 (citing House Report at 75).

[70] Sutherland Statutory Construction, 5th ed., Volume 2A, § 48.06 (1991).

[71] Id. at 221.

not "conclusively demonstrate[]" (as COMOL at 10 argues) that Congress meant to extend the Commission's authority to regulate basic rates any further than it specified in the words of the Act itself. Indeed, since the cited language is flatly inconsistent with the jurisdictional division as established by both the plain meaning of Sections 623(a)(4-6) and the overall Congressional preference for local regulation of basic cable rates, it must be summarily discarded by the Commission.

C. The Procedures Established for Basic Service Tier Regulation Must Be Simple And Must Avoid Title II Type Mechanisms

Time Warner stressed in its initial Comments that the Commission must eschew any inclinations to impose on local authorities' exercise of such powers rigid regulatory devices, especially those predicated on notions of public utility regulation.[72]

As discussed supra, with respect to the jurisdictional division of basic tier service regulation, the federal government cannot grant to the local governments specific regulatory powers. The local municipalities are inventions and agents of the states; the federal government is not unqualifiedly free to interfere with and redirect that relationship. The very same principles hold true for the specific means of regulation.[73] Most importantly, absent a permissive state statute and an explicit franchise agreement provision to do so, local franchise

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[72] Time Warner at 30-36.

[73] See Time Warner at 27.

authorities do not possess any tariffing-type powers to set rates, prescribe interim rates, suspend rates increases, or order refunds, etc.

NATOA attempts to defeat this fundamental principle with a passing citation to Lawrence County v. Lead-Deadwood School District No. 40-1[74] where the Court invalidated a state statute according local governments less discretion in spending federal aid than the federal statute. What NATOA fails to disclose, however, is that the authority of the federal government in Lawrence stemmed from its power under the Spending Clause of the U.S. Constitution. The Court's own discussion made this clear: It noted that Congress "has merely imposed a condition on its disbursement of federal funds.... It is far from a novel proposition that pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar."[75]

It is a fundamental principle of Constitutional law that "if the states accept federal money, they must accept any federal strings which come attached to that money."[76] As long as the grant of such funds does not violate any specific check on the federal power or limit any fundamental rights, any federal

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[74] 469 U.S. 256 (1985); NATOA at 30 and n. 14.

[75] 469 U.S. at 269-70 (footnote omitted).

[76] Nowak, Rotunda, and Young, Constitutional Law, 3rd edition, 1986, at 185-186.

strings attached to the grant are permissible.[77] Thus, it is not surprising that in Lawrence, where the Spending Clause was the source of the federal grant, and the statute and legislative history at issue evidenced "a clear intent to distribute funds directly to units of local government, bypassing the state,"[78] the contravening state law was superseded. Conversely, in the instant proceeding, neither the conditional strings of the Spending Clause nor the language or legislative history of the 1992 Cable Act support NATOA's claims. Seen in this light, NATOA's cite to Lawrence County is decidedly inapposite. One would expect such a result in light of our earlier discussion of local power as coming solely from state law.[79]

To construe the 1992 Cable Act as a source of Title II type powers would contradict the very terms and policy of both the 1992 Cable Act and the 1984 Communications Act. First, the imposition of Title II tariffing mechanisms would itself be in violation of Section 621(c)'s admonition that cable systems not be treated as common carriers in their provision of video

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[77] Bell v. New Jersey, 461 U.S. 773, 790 (1983).

[78] 469 U.S. at 263.

[79] See also Southern Iowa Electric Co. v. Chariton, 255 U.S. 539 (1921) (every power of a municipal corporation is derived from and depends upon the state law); Oklahoma v. Civil Service Commission, 330 U.S. 127, 143 (1947) (emphasis added) ("While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have the power to fix the terms upon which its money allotments to states shall be disbursed").

services.[80] Second, among the stated purposes of the Communications Act are the following:

- to establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;[81]
- to promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems;[82]
- to assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.[83]

Complex regulatory procedures as suggested by several commenters would undermine each of the foregoing purposes.

Third, the 1992 Cable Act contemplates an expeditious and minimally burdensome procedural framework for rate regulation. The Act specifically cautions the Commission to "seek to reduce the administrative burdens on subscribers, cable operators, franchise authorities, and the Commission" in designing procedures.[84]

Fourth, there is broad agreement among commenters that the public interest is not served by imposing on the cable industry the direct and indirect costs of rate of return regulation, nor

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[80] See also House Report at 83 ("It is not the Committee's intention to replicate Title II regulation").

[81] Communications Act § 601(2).

[82] Id. § 601(6).

[83] Id. § 601(4).

[84] Communications Act § 623(b)(2)(A).

of the procedural accoutrements characteristic of such a regulatory scheme.[85]

For all the foregoing reasons, the Commission must reject the detailed regulatory procedures suggested by some of the commenters. The procedures suggested by NATOA and other franchising authorities do not comport with the statutory goals. Rather, they would impose undue burdens and expense on cable operators and consumers by unnecessarily prolonging the rate review process, delaying the effectiveness of rate increases, and deferring the deployment of new services and innovative programming.

For example, NATOA argues that franchising authorities should be given 30 days notice of an intent to raise rates so they may "take initial steps" to start regulatory review. Thereafter, NATOA requests 120 days for an initial rate review plus an additional 90 days if franchise authorities require additional information to make their decision.[86] Under this proposal, a rate review could take 240 days. This is clearly inappropriate. Not only would such protracted rate review periods severely impair cable operations, they would also potentially deprive the public of new and higher quality services for extended periods of time. Moreover, given the fact that the Commission has been afforded only 180 days to establish a

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[85] See, e.g., Cablevision at 12-14; Continental at 35-36; Cox at 8-11; NATOA at 44-46.

[86] NATOA at 56. See also City of Austin, TX et al. at 61 (recommending total of 150 days for rate review process).

comprehensive rate regulation scheme for all cable operators, it seems disingenuous at best, ludicrous at worst, to think that franchising authorities would need 240 days to review the rates of a single cable operator. Time Warner reiterates its support for a 60 day period in which the franchise authority must act.[87] In Time Warner's experience, 60 days will provide ample time for the resolution of rate disputes, while not depriving the public of new services for long periods of time.

Similarly, NATOA's suggestion that cable operators be required to publish proposed rate increases in newspapers, in addition to subscriber bills, should be rejected, as well.[88] Subscriber notification via bill inserts is sufficient because all subscribers with standing to complain about rates will be given notice. Contrary to NATOA's suggestion, prospective subscribers do not have standing to sue.[89]

NATOA also proposes that rate increases should not become effective until the (interminable) rate review process has been completed. The rate increase, if approved, would then be retroactive, NATOA says, and a cable operator would be able to increase its rates over the short term to recover the equivalent of the increase had it gone into effect when originally requested.[90] There are no policy or legal reasons to stall the

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87 See Time Warner at 32-33.

88 NATOA at 59.

89 See Sierra Club v. Morton, 405 U.S. 727 (1972).

90 NATOA at 67.

effective date of rate increases. As Time Warner demonstrated in its initial Comments, cable operators will not have an incentive to price unreasonably once reasonableness has been defined by the Commission's benchmark.[91] In addition, as discussed above, local authorities have incentives to stall or preclude any proposed rate increase, despite its reasonableness, in order to gain political goodwill. Local authorities have every incentive to push as much of the costs of cable service into other cable systems and franchise areas. And, of course, if enough of them succeed, cable quality is reduced nationwide. These untoward results can easily be avoided by allowing the rate increase to go into effect immediately, subject only to a contrary provision in specific franchise agreements.

Finally, claims by NATOA and other franchising authorities suggesting that the 1992 Cable Act empowers local governments to designate rates or order refunds are simply wrong.[92] As Time Warner has stressed throughout these Reply Comments and its initial Comments, the 1992 Cable Act does not and cannot grant franchising authorities the power to order refunds or set rates. Since local governments are creatures of the state, whether they have such powers is a matter of state law, and further, the specific franchise agreements.

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[91] Time Warner at 24-25; Kelley at 20-21 and n. 31.

[92] CFA at 156; City of Austin, TX et al. at 58; NATOA at 63-65; New York State Cable Commission at 25.

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In sum, the Commission should adopt a simple, easily administered benchmark approach for the regulation of the basic service tier. It should refrain from promulgating elaborate procedures for either its own processes or that of local franchising authorities. Most importantly, the proposed tariff review mechanisms borrowed from Title II of the Communications Act for the regulations of common carriers are wholly inappropriate.

III. Regulation of Cable Programming Service

A. Unregulated Premium Services Are Not Transformed into Regulable Cable Programming Services if Offered on a Packaged Basis

The Commission should reject the suggestions of a few commenters that premium program offerings that are packaged together become a "tier" for regulatory purposes.[93] Per channel/per program offerings were meant to be wholly unregulated by Congress, since they are not within the basic service tier[94] and are explicitly excluded from the definition of cable programming services.[95]

As the Notice correctly concludes, Congress clearly intended to exempt multiplexed programming from regulation.[96] There

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[93] See, e.g., CFA at 136-137; NATOA at 78; New York State Commission at 13.

[94] See Communications Act § 623(b)(7).

[95] Id. § 623(l)(2). See also Notice at ¶ 95.

[96] Notice at ¶ 95. See also House Report at 80.

simply is no logical or policy reason originating from either the 1992 Act or common sense that justifies disparate treatment for packages of programming based solely on whether the package contains the same or different programming. As long as the package components are individually available, consumers benefit from the ability to purchase such packages at a discount. The Commission should thus maintain the unregulated status of premium, discounted packages, as long as the channels comprising the package are offered to consumers on an individualized basis.

B. The Commission Should Reject All Suggestions to Conflate the Basic Service Tier and Cable Programming Services Regulatory Regimes

In its initial Comments, Time Warner demonstrated that Congress did not intend to replicate the basic service rate scheme for cable programming services, but only to create a mechanism to protect against egregious pricing abuse through a complaint mechanism.[97] Time Warner pointed out that if the Commission adopts a cable programming services rate regulation scheme that brings all services under actual regulation similar to the basic service rate scheme, it will risk jeopardizing the quality and quantity of programming, generally.[98]

To avoid such inadvertent results, Time Warner recommended the adoption of a regulatory approach for cable programming services that would identify current rates and target the top 2-5% of systems (or subscribers) as measured in terms of rate

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[97] Time Warner at 39-43.

[98] Id. at 42-43.

levels and subject only this targeted group to complaint and regulatory scrutiny (a so-called "outlier" approach). In years following 1993, the outlier analysis would be performed on the basis of industry increases rather than industry rates. All other operators would be entitled to the safe harbor of the industry norm.[99]

This approach would have substantial effects. A 2% threshold would render approximately 220 cable systems vulnerable to complaints filed by approximately 1.1 million subscribers. A 5% threshold would subject approximately 555 cable systems to complaints potentially filed by approximately 2.76 million subscribers.[100]

Most commenters recognized the marked difference between the reactive cable programming services regulatory mechanism which regulates in the exception only and the proactive, comprehensive scheme established by Section 623(b) for basic cable service.[101]

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[99] Time Warner at 43-44. Due to the extraordinary rates at which cable programming costs have been rising in recent years, Time Warner also proposed that in defending a complaint, "outlier" cable systems should be able to pass through increased costs to demonstrate reasonableness. Id. at 45.

[100] See Owen, Baumann, and Furchgott-Roth, Cable Regulation: A Multi-stage Benchmark Approach, January 27, 1993, submitted as Attachment to Comments of NCTA, at 23.

While these calculations assume that the same percentage of cable subscribers and cable systems are affected by the Commission's regulations, in practice, the percentage of cable systems affected could differ from the percentage of subscribers affected depending on the distribution of affected subscribers across systems.

[101] See, e.g., Arts and Entertainment at 14-17; Continental at 49-50; NCTA at 54-63.

However, a few commenters chose to ignore this distinction. NATOA and CFA, for example, treat the "not unreasonable" rate standard for cable programming services as equivalent to the "reasonable" rate standard for basic service.[102] CFA, for example, argues at one point:

> The economic and legal definition of reasonable and unreasonable are two sides of the same coin. If Congress had intended for a not unreasonable rate to be higher than a reasonable one, it certainly would have chosen a different word.[103]

The problem with such treatment of the two standards is that it patently ignores both the literal language of the statute as well as the extensive legislative history cited by Time Warner in its original Comments disclosing Congress' intent to establish an egregious standard for cable programming services.[104] The Commission should ignore such tenuous attempts to conflate these distinct standards and should establish a regulatory regime for cable programming services that targets and regulates only those bad actors charging egregious rates.

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[102] CFA at 82; City of Austin, TX et al. at 14, 36; NATOA at 71-72.

[103] CFA at 82.

[104] Time Warner at 40-41.

C. Regulation of Cable Programming Services Must be Based on Expeditious Procedures and Must be Performed Solely by the Commission

Time Warner recommended in its initial Comments that the procedures promulgated for cable programming services should be as simple and expeditious as possible.[105] Time Warner reiterates this recommendation here. Further, in this regard, we also dispute NATOA's proposal that the Commission delegate its authority to regulate cable programming service rates to local governments.[106] NATOA claims that "nothing in Section 623 or its legislative history prohibits the delegation of such regulatory authority to franchising authorities."[107] NATOA's claim would be correct, provided the Commission is willing to ignore the Act's unequivocal directive that "cable programming services shall be subject to regulation by the Commission."[108]

In addition, a scheme which authorized local governments to review rates initially would prolong the review process and increase overall administrative burdens by requiring two independent reviews of the appropriateness of the proposed rates. Moreover, such duplicative reviews would expend taxpayer dollars at both the local and federal level to perform a task that can be undertaken expeditiously by the Commission. This is especially true, given the nature of the cable programming services

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105 Id. at 45-47.

106 NATOA at 72-73.

107 Id. at 72.

108 Communications Act § 623(a)(2)(B) (emphasis added).

complaint scheme which envisions regulation only of egregious rates charged by bad actors.

Finally, the Commission has no inherent authority to delegate its statutory responsibilities to third parties. Section 5(c)(1) of the Communications Act, 47 U.S.C. § 155(c)(1), controls the exclusive means by which the agency can delegate its functions; such lists include only commissioners or employees of the Commission to so act.[109] Thus, neither the Communications Act nor the new Cable Act allows the suggested delegation.

IV. REGULATION OF EQUIPMENT

A. Only Equipment Used Solely To Receive Basic Service Is Regulated Based On Actual Cost

As Time Warner explained in its Comments, Congress intended that only customer equipment used solely to receive basic service, not equipment used to receive basic plus higher service levels, is to be priced on the basis of actual cost.[110] Other commenters agreed with this position.[111] Some commenters, however, argued that all equipment should be subject to actual

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[109] This point of law is underscored by the addition of Section 4(f), which permits the Commission to utilize private examiners for amateur license examinations. Pub. L. 97-259. The Senate Report explained that such authority was to be added "notwithstanding any contrary provision of law." S. Rep. No. 97-404, 97th Cong. 2d Sess. 28 (1982).

[110] Time Warner at 48-56.

[111] See, e.g., Adelphia at 63-72; Continental at 39; NCTA at 49.

cost pricing.[112] For instance, the Village of Schaumburg, IL complained that if basic and non-basic equipment were regulated differently, confusion would arise where "equipment is used for both basic and cable programming service," and that cable operators could raise rates for equipment used to receive non-basic service "to make up for perceived lost revenue from equipment used for basic service."[113] However, Time Warner explained in detail in its Comments that equipment used for both basic and non-basic service has been distinguished in the past by the Commission and the U.S. Copyright Office, and was clearly intended by Congress to be treated separately from equipment used by basic-only subscribers.[114] As to Schaumburg's second point, this fear is unfounded. Any rate increase for equipment used to receive a tier above basic would be subject to scrutiny pursuant to the 1992 Cable Act's "unreasonable" standard for non-basic rates.[115] Moreover, if the equipment is used to descramble premium or other a la carte services (such as an addressable descrambler), the rental price of the equipment is unregulated along with the underlying service, even if the equipment also incidentally allows basic and cable programming service signals to pass to the customer's television receiver.

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[112] See, e.g., CFA at 131-132; NATOA at 48-49; New Jersey Board of Regulatory Commissioners at 23; Village of Schaumburg, IL ("Schaumburg") at 9.

[113] Schaumburg at 9.

[114] Time Warner at 49-56.

[115] Communications Act § 623(c).